

Supreme Court, U.S.  
FILED

JUL 20 1988

JOSEPH F. SPANIOL  
CLERK

88-121

NO. \_\_\_\_\_

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1988

---

LARRY D. BARNETTE, ALLIED  
MANAGEMENT CORPORATION, JETS  
VENTURE CAPITAL CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

---

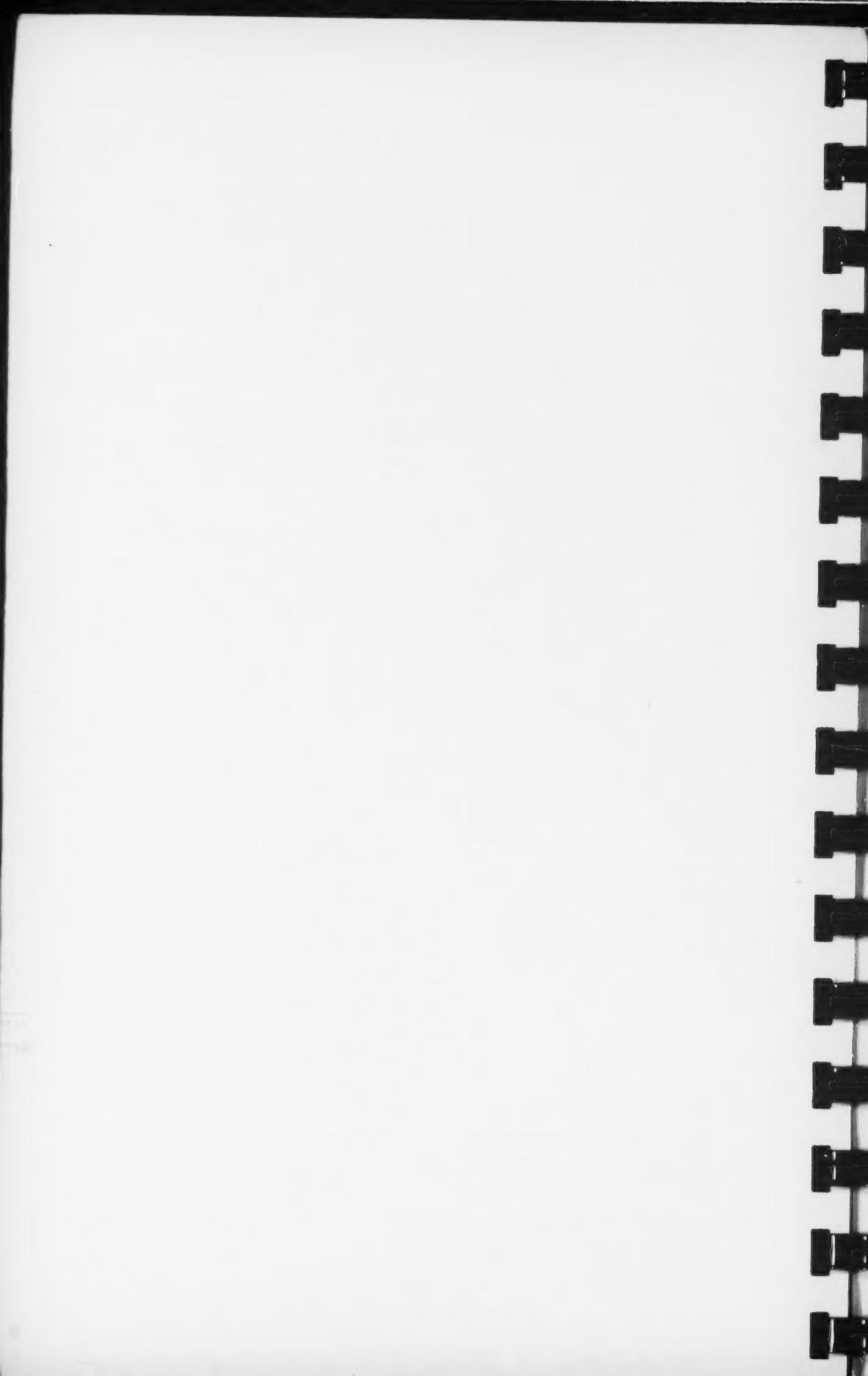
PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

Charles W. Arnold, Jr.  
BOOTH & ARNOLD, P.A.  
1301 Gulf Life Drive,  
Suite 2440  
Jacksonville, Florida 32207  
(904) 399-5400

COUNSEL FOR PETITIONERS

July 15, 1988



QUESTIONS PRESENTED

I. Whether the laws of the United States allow a United States District Court to enhance the criminal sentence of a defendant by ordering that interest earned on a defendant's supersedeas appeal bond, which was posted to guarantee the payment of court ordered restitution, must be paid to the United States.

II. Whether the double jeopardy clause of the Constitution of the United States allows a District Court to increase a sentence after the finality of a criminal appeal by awarding the United States interest that was earned on petitioner's appeal bond that was posted to secure the payment of court ordered restitution.

LIST OF PARTIES AND AFFILIATES  
OF EACH CORPORATION

The parties to the proceedings below were the petitioners, Larry D. Barnette, Allied Management Corporation and Jets Venture Capital Corporation and the respondent, the United States of America.

Pursuant to Rule 28.1 subsidiaries of Allied Management Corporation are Jets Services, Inc. and J.E.T.S., Inc.

## TABLE OF CONTENTS

	Page
Questions Presented for Review . . . . .	i
List of Parties and Affiliates of Each Corporation. . . . .	ii
Table of Contents. . . . .	iii
Table of Authorities . . . . .	v
Opinions Below . . . . .	2
Jurisdiction . . . . .	2
Statutes Involved. . . . .	2
Statement of the Case. . . . .	3
Reasons for Granting the Writ. . . . .	8
I. The Eleventh Circuit's Opinion Authorizes The District Court to Impose an Interest Penalty on a Restitution Judgment When There is No Statutory Authority For Such a Result . . . . .	8
II. The Eleventh Circuit Opinion Authorizes the District Court to Enhance the Penalty Exacted on a Defendant Merely Because He Chose to Appeal His Underlying Sentence. The Double Jeopardy Clause of the Constitution Does Not Permit the Imposition of this Enhanced Penalty . . . . .	12

Cont'd.

	Page
Conclusion . . . . .	16

## Appendices

### Appendix A:

1. Opinion and Judgment of Court of Appeals dated May 5, 1988 . . . . . 1a
2. Order of Eleventh Circuit Denying Rehearing Dated May 31, 1988 . . . . . 10a

### Appendix B:

1. 18 U.S.C. § 3651 . . . . . 1b
2. 18 U.S.C. § 3579 . . . . . 7b
3. U.S. Const. Amend. V . . . . . 14b

## TABLE OF AUTHORITIES

### CASES

<u>Affronti v. United States</u> , 342 U.S. 79 (1955) . . . . .	10
<u>Bank of Nova Scotia v. United States</u> , Case No. 87-578 . . . . .	11
<u>Barnes v. United States</u> , 223 F.2d 891 (5th Cir. 1955). . . . .	13
<u>Ex Parte Lange</u> , 18 Wall 163, 85 U.S. 163 (1874). . . . .	15
<u>Gillis v. State of California</u> , 293 U.S. 62 (1934) . . . . .	9
<u>Jeffers v. United States</u> , 432 U.S. 137 (1977) . . . . .	15
<u>Kilpatrick v. United States</u> , Case No. 87-602 . . . . .	11
<u>Morissette v. United States</u> , 342 U.S. 246 (1951) . . . . .	10
<u>North Carolina v. Pearce</u> , 395 U.S. 711 (1969) . . . . .	13
<u>Owen Equipment and Erection Company v. Kroger</u> , 437 U.S. 364 (1978) . . . . .	9
<u>United States v. Barnette</u> , 800 F.2d 1558 (11th Cir. 1986) . . . . .	5
<u>United States v. Benz</u> , 282 U.S. 304 (1931) . . . . .	15
<u>United States v. Difrancesco</u> , 449 U.S. 117 (1980) . . . . .	10, 14

Cont'd.

CASES

Page

<u>United States v. Jacob Schmidt Brewing Company, 254 F 714 (D. N.D. 1918)</u> . . . . .	11
---	----

CONSTITUTIONAL PROVISIONS

U.S. Const. Amend. V . . . . .	2
--------------------------------	---

STATUTES AND RULES

18 U.S.C. § 3565. . . . .	12
18 U.S.C. § 3579. . . . .	3, 9
18 U.S.C. § 3651. . . . .	3, 9
28 U.S.C. § 1254(1) . . . . .	2
Fed. R. Crim. P., Rule 38 . . . . .	9

OTHER AUTHORITIES

U.S. Code Cong. Ad. News, 5433, 5440 (1984) . . . . .	12
--	----

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term, 1988

---

LARRY D. BARNETTE, ALLIED  
MANAGEMENT CORPORATION, JETS  
VENTURE CAPITAL CORPORATION,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

---

PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

Petitioners, Larry D. Barnette,  
Allied Management Corporation and Jets  
Venture Capital Corporation respectfully  
pray that a writ of certiorari issue to  
review the judgment and opinion of the  
United States Court of Appeals for the  
Eleventh Circuit entered in the  
above-entitled proceeding on May 5, 1988.

OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is Case Number 87-3183 dated May 5, 1988, reported at \_\_\_\_ F.2d \_\_\_\_, and is reprinted in Appendix A hereto, see infra page 1a. A timely petition for rehearing was denied on May 31, 1988, see infra page 10a.

JURISDICTION

Petitioners seek review of an order and opinion dated May 5, 1988, of the United States Court of Appeals for the Eleventh Circuit, see infra Appendix A, page 1a. The jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V to the Constitution of the United States and pertinent provisions of law dealing with a district court's

authority to order restitution, 18 U.S.C. § 3651 and 18 U.S.C. § 3579 are set forth in Appendix B, see infra page 1b.

#### STATEMENT OF THE CASE

On August 30, 1983, an indictment was returned in the United States District Court for the Middle District of Florida charging petitioners, Larry D. Barnette (Barnette), Allied Management Corporation (Allied), Jets Venture Capital Corporation (JVCC), and other defendants with various charges primarily relating to government contract fraud. In July, 1984, petitioners were convicted of a majority of the counts and they were sentenced in November, 1984. Barnette was sentenced to serve five years imprisonment and to pay \$7,000,000.00 in restitution to the United States Army. The \$7,000,000.00 in restitution was to be paid by the end of his first year of imprisonment. The

restitution judgment and sentence contained no provision for the accrual or payment of interest. Allied was ordered to pay a fine of \$71,000.00 and JVCC was fined a total of \$2,000.00. These fines were to be paid within ninety days of the date of sentencing. Petitioners moved to stay the execution of their sentences pending appeal. On December 13, 1984, petitioners' motions for stay were granted. The stays were conditioned upon posting supersedeas bonds with the district court in an amount equal to the \$7,000,000.00 in restitution and in the amount of the two fines. On January 10, 1985, petitioners posted the required supersedeas bonds in the form of interest bearing certificates of deposit.

The direct criminal appeals of petitioners were duly prosecuted in the Eleventh Circuit Court of Appeals and on October 8, 1986, the Eleventh Circuit

affirmed the judgments and sentences of the district court with the exception of one count. United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986), cert. denied, \_\_\_\_ U.S. \_\_\_\_, 107 S.Ct. 1578 (1987).

Barnette began serving the incarceration portion of his sentence on December 4, 1986. Pursuant to the court's original judgment and sentence, the due date for the payment of the \$7,000,000.00 in restitution would therefor be December 4, 1987. That is, one year after commencing the incarceration portion of Barnette's sentence.

On January 29, 1987, the United States filed a motion with the district court requesting that the supersedeas bond funds be disbursed to the United States including all interest that accrued on the certificates of deposit since they were deposited on January 5, 1985. On

March 11, 1987, the district court entered its order directing the clerk of the court to disburse the principal of the supersedeas bonds and all interest that had accrued on the bonds to the United States. The district court stayed that order pending an appeal to the Eleventh Circuit Court of Appeals.

On May 5, 1988, the Eleventh Circuit Court of Appeals determined that the district judge was in error in ordering all of the interest paid to the United States. The opinion of the Eleventh Circuit awarded interest accruing between January 10, 1985 and January 10, 1986, to petitioner Barnette. Interest accruing after that date, which is well in excess of \$1,000,000.00, was awarded to the United States. The Eleventh Circuit reasoned that Barnette, had he not appealed his original sentence and had commenced the incarceration portion of his

1

sentence, would have been required to pay the court ordered restitution by January 10, 1986. This decision of the Eleventh Circuit authorizes the accrual and awarding of interest on a restitution judgment when there is no statutory authority for the imposition of this enhanced punishment on a criminal defendant.

On May 31, 1988, the Eleventh Circuit denied a timely motion for rehearing and on June 13, 1988 a stay was granted pending the filing of this petition. The funds involved are presently in the registry of the court.

## REASONS FOR GRANTING THE WRIT

### I.

THE DECISION OF THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AUTHORIZES THE DISTRICT COURT TO IMPOSE AN INTEREST PENALTY ON A RESTITUTION JUDGMENT WHEN THERE IS NO STATUTORY AUTHORITY FOR SUCH A RESULT.

Without congressional authorization, the Eleventh Circuit has authorized the District Court to exact a new penalty upon a defendant in a criminal case. That penalty is the awarding to the United States of interest that accrues on a supersedeas bond that was posted, pending appeal, to secure the payment of court ordered restitution. The Eleventh Circuit opinion ignores the time honored rulings of this court that the lower federal courts were created by the acts of congress and their powers and duties depend solely upon those acts of

congress.                   Gillis v. State of California,     293 U.S.     62     (1934). Jurisdiction of the federal courts is clearly limited by Article 3 of the Constitution and acts of congress.   Owen Equipment and Erection Company v. Kroger, 437 U.S. 365 (1978).

In the present case, there is no question that the district court had authority to order Barnette to pay the \$7,000,000.00 in restitution.   See 18 U.S.C. § 3651 and § 3579.   The court also had authority to require the posting of a supersedeas bond to insure the payment of that restitution.   See Rule 38, Fed.R.Crim.P.   However, unlike civil judgments, there is no statutory authority for the awarding of interest on the restitution judgment by way of an outright pronouncement of sentence or by the circuitous route of ordering interest that accrued on a supersedeas bond to be paid

to the United States. Just as federal courts do not have the authority to create crimes nor to enlarge the reach of enacted crimes, the power to sentence a defendant and impose penalties springs solely from acts of the legislature. Morissette v. United States, 342 U.S. 246 (1951) and Affronti v. United States, 350 U.S. 79 (1955). Also, a defendant may not receive a greater sentence than one that has been authorized by the legislature. United States v. Difrancesco, 449 U.S. 117 (1980).

The action of the district court in ordering all of the interest to be paid to the United States, and the opinion of the Eleventh Circuit deciding that a majority of the interest should be paid to the United States, are actions of lower district courts that were made without any statutory authority. Under this court's supervisory authority over lower federal

courts, it should issue its writ of certiorari to review the decision of the Eleventh Circuit Court of Appeal. This supervisory authority was recently noted in Bank of Nova Scotia v. United States and Kilpatrick v. United States, case numbers 87-578 and 87-602, \_\_\_\_ U.S. \_\_\_\_ (June 22, 1988).

Research has located only one case in the history of federal cases that has ruled on the question of the awarding of interest on criminal judgments. The decision of the Eleventh Circuit Court of Appeals is in direct conflict with the decision of United States v. Jacob Schmidt Brewing Company, 254 F. 714 (D. N.D. 1918) which holds that there is no statutory authority for the accrual of interest on criminal fines. The decision of the Eleventh Circuit approves the awarding of interest on fines as well as restitution.

It is to be noted that after the conviction and sentence of the defendant, congress did pass new legislation that imposed interest on fines. See, 18 U.S.C. § 3565 and comments reprinted in 1984, U.S. Code Cong. & Ad. News, 5433, 5440. Therein, the legislative history of 18 U.S.C. § 3565 is stated that congress for the first time imposed interest on fines by the passage of that section. To date, congress has not seen fit to pass a law authorizing the accrual of interest on restitution judgments.

This court should not allow the Eleventh Circuit precedent to stand that a district court does not need statutory authority to award interest on a criminal judgment.

## II.

THE ELEVENTH CIRCUIT'S OPINION AUTHORIZES THE DISTRICT COURT TO ENHANCE THE PENALTY EXACTED ON A DEFENDANT MERELY BECAUSE HE

CHOSE TO APPEAL HIS UNDERLYING SENTENCE. THE DOUBLE JEOPARDY CLAUSE OF THE CONSTITUTION DOES NOT PERMIT THE IMPOSITION OF THIS ENHANCED PENALTY.

In its opinion, the Eleventh Circuit notes that a trial court cannot punish a defendant for pursuing a direct appeal from his conviction, citing North Carolina v. Pearce, 395 U.S. 711 (1969). The Eleventh Circuit also notes that a district court may not increase a sentence after an affirmance on appeal, citing Barnes v. United States, 223 F.2d 891 (5th Cir. 1955). After citing and giving lip service to that precedent, the Eleventh Circuit then grants the district court authority to enhance a penalty exacted on a criminal defendant after an affirmance of his appeal. Barnette submits that to allow the exacting from him of an additional penalty in excess of \$1,000,000.00, by awarding the government the majority of the interest that accrued

on his supersedeas bond, is a clear violation of the double jeopardy clause of the Constitution. U.S. Const. Amend. V.

When dealing with the double jeopardy clause, an analysis should be made of the substance of the action that was taken against a defendant and not the label that may be given to that action. United States v. Difrancesco, 449 U.S. 117 (1980). The substance of the action in the Barnette case is quite simple. In November, 1984, Barnette was sentenced to pay \$7,000,000.00 in restitution to be paid by the end of his first year of confinement. He duly appealed that sentence and lost his appeal. He began his sentence in December, 1986 and was thereby required to pay the restitution by December, 1987. However, because he lost his direct criminal appeal, the court in its order of March, 1987, directed the clerk to take the defendant's appeal

supersedeas bond of \$7,000,000.00 and pay it to the United States together with all interest that accrued on the posted bond. Although the Eleventh Circuit has corrected a portion of that error, the remaining interest penalty totalling in excess of \$1,000,000.00, clearly increases the sentence of the defendant in violation of the Constitution of the United States. It has long been established that once a prisoner commences service of his sentence the double jeopardy clause prevents the imposition of a greater sentence. United States v. Benz, 282 U.S. 304 (1931) and Ex Parte Lange, 18 Wall 163, 85 U.S. 163 (1874). This law is applicable to the question of monetary penalties and fines as well as the incarceration portion of any sentence. Jeffers v. United States, 432 U.S. 137 (1977).

Since the action of the Eleventh Circuit and the district court clearly

enhances the sentence of Barnette, this court should issue its writ to review the decision of the Eleventh Circuit.

#### CONCLUSION

For the reasons that the action of the district court, as authorized by the Eleventh Circuit Court of Appeals, was made without statutory authority and in violation of the double jeopardy clause of the Constitution of the United States, this court should grant this petition for writ of certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit.

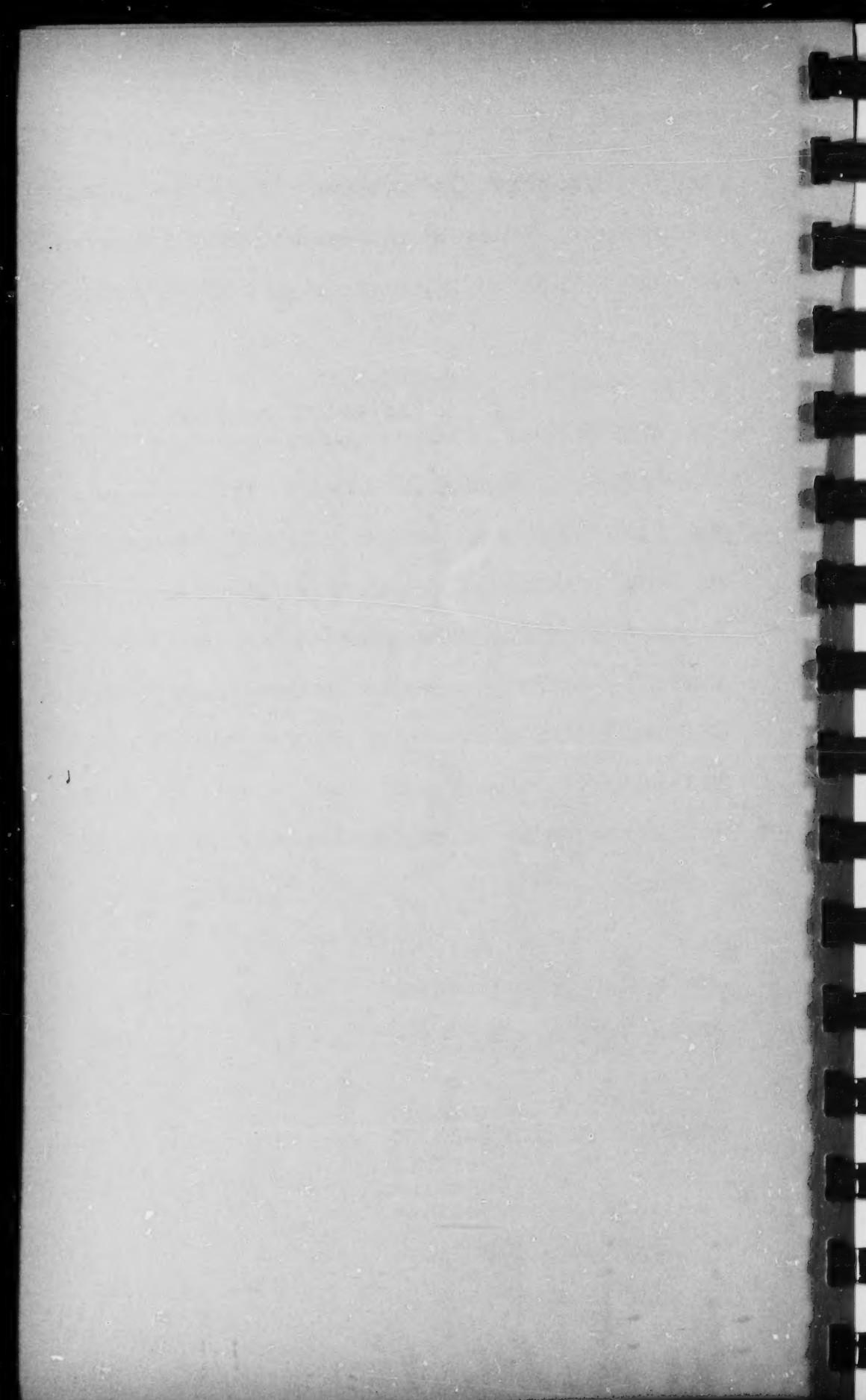
Respectfully submitted,

*Charles W. Arnold Jr.*

Charles W. Arnold, Jr.  
Counsel for Petitioner  
1301 Gulf Life Drive  
Suite 2440  
Jacksonville, Florida  
32207  
(904) 399-5400

July 15, 1988

## **APPENDIX A**



IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

NO. 87-3183

---

D.C. Docket No. 83-131

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY D. BARNETTE, ALLIED  
MANAGEMENT CORP., JETS VENTURE  
CAPITAL CORP.,

Defendant-Appellant.

---

Appeal from the United States District Court  
for the  
Middle District of Florida

---

(May 5, 1988)

Before RONEY, Chief Judge, JOHNSON, Circuit Judge, and PECK\*, Senior Circuit Judge.

PER CURIAM:

Cash bonds in the form of certificates of deposit were posted by defendants as a condition of a stay pending appeal of their criminal sentences, involving substantial fines and incarceration. This case decides whether the Government or the defendants are entitled to the interest which accrued until defendants' convictions were affirmed.

Defendants Larry D. Barnette, Allied Management Corporation and Jets Venture Capital Corporation, were tried, convicted and sentenced under an indictment which charged a range of crimes arising from defendants' fraudulent Government

---

\*Honorable John W. Peck, Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

contracting practices. Barnette was sentenced to a total of five years incarceration and ordered to pay \$7,000,000 in restitution to the Government, and Allied and Jets Venture were fined \$71,000 and \$2,000 respectively. After the filing of motions for clarification and postponement, Barnette's surrender date was set on January 10, 1985, and the restitution ordered paid within the first year of Barnette's confinement. The corporate fines were to be paid within 90 days of the date of judgment.

Motions to stay execution of the sentences pending appeal were granted upon the condition that each defendant post a bond in the amount of the ordered restitution or fine. The stay order specifically provided that any interest accruing on deposited funds was to remain in the registry of the court. On January 10, 1985, the defendants posted cash bonds with

the clerk, in the form of one-year certificates of deposit.

When these certificates of deposit matured in January of 1986, defendants' appeal was still pending. Defendants therefore moved for renewal of the certificates and return of accrued interest. The district court ordered the clerk to renew the certificates, but deferred ruling on the interest question until resolution of the appeal.

On October 8, 1986, this Court upheld defendants' convictions and sentences, with the exception of one sentence on one count.

United States v. Barnette, 800 F.2d 1558 (11th Cir. 1986), cert. denied, 107 S.Ct. 1578 (1987). On December 4, 1986, Barnette began serving the incarceration portion of his sentence. The Government moved for disbursement of the funds held by the clerk, and on March 11, 1987, over defendants' objections, the district court

ordered the cash bonds and all accrued interest be disbursed to the Government. This order was stayed, however, pending the instant appeal.

There are two basic principles which guide the review of the district court's order. First, pursuant to 18 U.S.C.A. § 3579, a trial court has broad authority to order restitution and determine when it is to be paid. This is consistent with the general principle that trial courts have wide discretion in setting criminal sentences. See Solem v. Helms, 463 U.S. 277, 290 (1983); United States v. Carson, 669 F.2d 216, 217 (5th Cir. Unit B 1982). A trial court also has discretionary authority to require a defendant to guarantee payment of a fine, by requiring the posting of a bond pending appeal, Fed. R. Crim. P. 38 (a)(3); United States v. Astling, 733 F.2d 1446, 1461 (11th Cir. 1984).

Second, a trial court cannot punish a defendant for pursuing a direct appeal from a conviction. See North Carolina v. Pearce, 395 U.S. 711, 738 (1969) ("To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."). Neither can a district court increase a sentence after an affirmance. Barnes v. United States, 223 F.2d 891 (5th Cir. 1955) (court may not condition an appeal bond upon the requirement that defendant pay the costs of prosecution if conviction is affirmed). The purpose of a bond is to secure the presence of the defendant or to prevent dissipation of the defendant's assets, not to enrich the Government or punish the defendant. United States v. Rose, 791 F.2d 1477 (11th Cir. 1986) (condition on bond that it would be retained by the clerk to pay any fine levied against the defendant at sentencing invalid

under Eighth Amendment and Bail Reform Act). See also United States v. Powell, 639 F.2d 224 (5th Cir. Unit A March 1981); United States v. Jones, 607 F.2d 687 (5th Cir. 1979).

A review of the facts under these principles reveals that part of the accrued interest on the bond should go to the defendants, and part to the Government. If Barnette had not pursued an appeal, his restitution payment, under the district court's order, would have been finally due until January 10, 1986, one year after he would have commenced his confinement had there been no appeal and stay. Since Barnette would have been able to keep the interest earned on \$7,000,000 during that year, disbursal of that year's interest to the Government would constitute an impermissible burden on Barnette's right to appeal. Awarding the Government interest accruing after January 10, 1986, however,

simply gives the Government what it would have had were there no appeal and had the money been paid when due. Such an order does not penalize Barnette for pursuing an appeal, and furthers the trial court's expressed intention that the appeal should not delay payment of the ordered restitution.

Barnette contends that the district court's sentencing order could be construed as requiring the restitution to be paid within a year following his release from confinement. Any ambiguity in that regard was clarified upon Barnette's motion for sentence modification when the district court held that "all sentences of restitution are to run concurrently and that the total amount of \$7 million is to be paid within the first year of confinement."

The fines imposed upon the corporate defendants were to be paid within ninety days of the date of judgment or by February 2, 1985. Based on the above rationale, the

corporate defendants are entitled to interest accruing on their bonds between January 10, 1985 and February 2, 1985, and the balance of the accrued interest should be paid to the Government.

This case is remanded to the district court for further proceedings consistent with this decision.

VACATED AND REMANDED.

IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

---

NO. 87-3183

---

Filed  
U.S. Court of Appeals  
Eleventh Circuit  
May 31, 1988  
Miguel J. Cortez, Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

LARRY D. BARNETTE, ALLIED  
MANAGEMENT CORPORATION and  
JETS VENTURE CAPITAL CORPORATION,

Defendants-Appellants.

---

Appeal from the United States  
District Court for the  
Middle District of Florida

---

ON PETITION FOR REHEARING AND  
SUGGESTION OF REHEARING IN BANC

(Opinion May 5, 1988, 11 Cir., 198\_\_\_\_,  
\_\_\_\_ F.2d \_\_\_\_).

(May 31, 1988)

Before RONEY and JOHNSON, Circuit Judges,  
and PECK\*, Senior District Judge.

PER CURIAM:

( x ) The Petition for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion of Rehearing In Banc are Denied.

ENTERED FOR THE COURT:

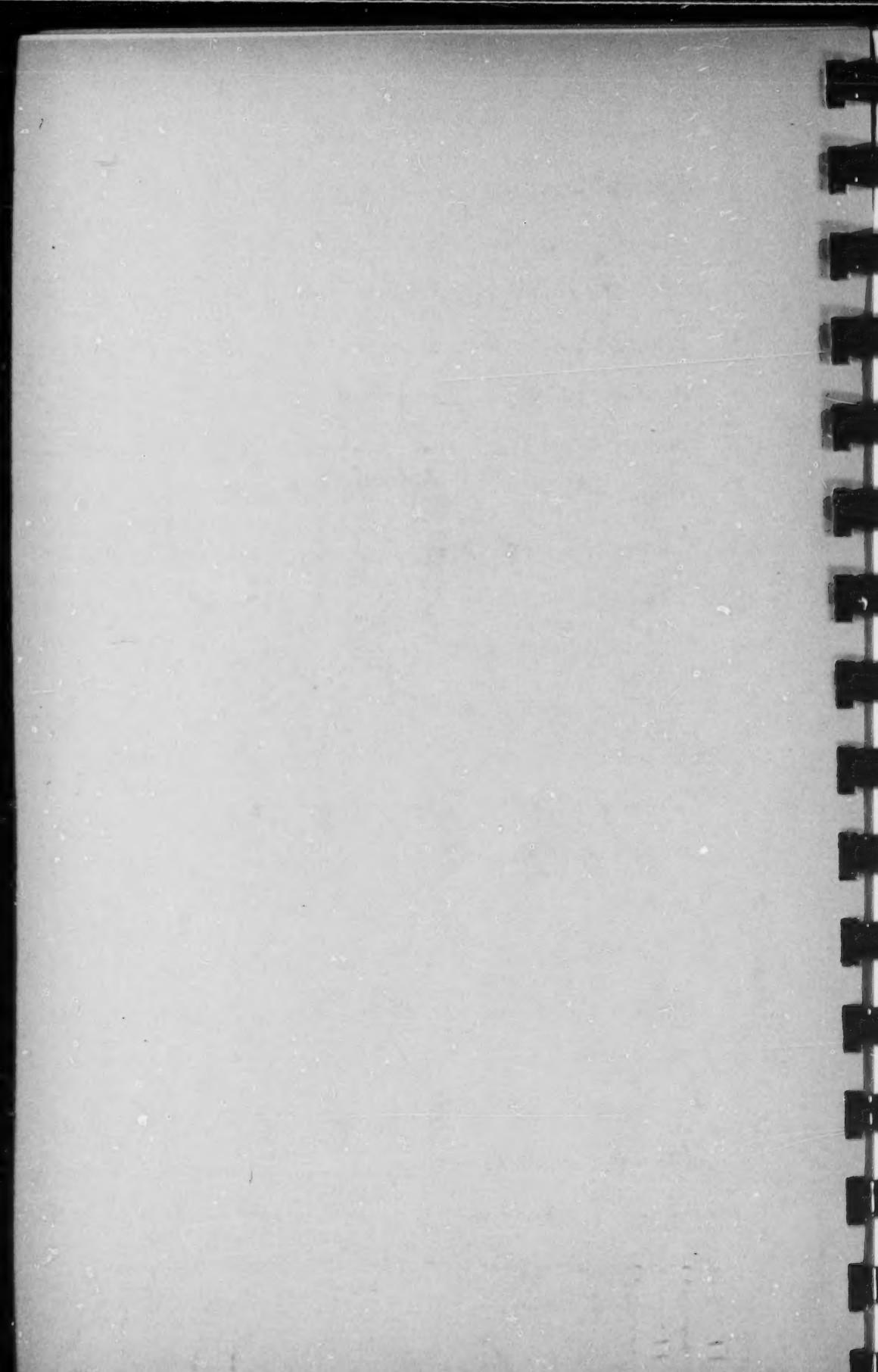
---

United States Circuit Judge

\* Honorable John W. Peck, Senior U.S. Circuit Judge for the Sixth Circuit, sitting by designation.



**APPENDIX B**



§ 3651 Suspension of Sentence and Probation

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied

that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best.

Probation may be granted whether the offense is punishable by fine or imprisonment or both. If an offense is punishable by both fine and imprisonment, the court may impose a fine and place the defendant on probation as to imprisonment. Probation may be limited to one or more counts or indictments, but, in the absence of express limitation, shall extend to the entire sentence and judgment.

The court may revoke or modify any condition of probation, or may change the period of probation.

The period of probation, together with any extension thereof, shall not exceed five years.

While on probation and among the conditions thereof, the defendant -

May be required to pay a fine in one or several sums; and

May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had; and

May be required to provide for the support of any persons, for whose support he is legally responsible.

The court may require a person as conditions of probation to reside in or participate in the program of a residential community treatment center, or

both, for all or part of the period of probation: Provided, That the Attorney General certifies that adequate treatment facilities, personnel, and programs are available. If the Attorney General determines that the person's residence in the center or participation in its program, or both, should be terminated, because the person can derive no further significant benefits from such residence or participation, or both, or because his such residence or participation adversely affects the rehabilitation of other residents or participants, he shall so notify the court, which shall thereupon, by order, make such other provision with respect to the person on probation as it deems appropriate.

A person residing in a residential community treatment center may be required to pay such costs incident to residence as the Attorney General deems appropriate.

The court may require a person who is an addict within the meaning of section 4251(a) of this title, or a drug dependent person within the meaning of section 2(q) of the Public Health Service Act, as amended (42 U.S.C. 201), as a condition of probation, to participate in the community supervision programs authorized by section 4255 of this title for all or part of the period of probation.

The defendant's liability for any punishment (other than a fine) imposed as to which probation is granted, shall be fully discharged by the fulfillment of the terms and conditions of probation. If at the end of the period of probation, the defendant has not complied with a condition of probation, the court may nevertheless terminate proceedings against the defendant, but no such termination shall affect the defendant's obligation to pay a fine imposed or made a condition of

probation, and such fine shall be collected in the manner provided in section 3565 of this title.

§ 3579 Order of Restitution

(a)(1) The court, when sentencing a defendant convicted of an offense under this title or under subsection (h), (i), (j), or (n) of section 902 of the Federal Aviation Act of 1958 (49 U.S.C. 1472), may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense.

(2) If the court does not order restitution, or orders only partial restitution, under this section, the court shall state on the record the reasons therefor.

(b) The order may require that such defendant -

(1) in the case of an offense resulting in damage to or loss or

destruction of property of a victim of the offense -

(A) return the property to the owner of the property or someone designated by the owner; or

(B) if return of the property under subparagraph (A) is impossible, impractical, or inadequate, pay an amount equal to the greater of -

(i) the value of the property on the date of the damage, loss, or destruction, or

(ii) the value of the property on the date of sentencing, less the value (as of the date the property is returned) of any part of the property that is returned;

(2) in the case of an offense resulting in bodily injury to a victim-

(A) pay an amount equal to the cost of necessary medical and related professional services and devices relating

to physical, psychiatric, and psychological care, including nonmedical care and treatment rendered in accordance with a method of healing recognized by the law of the place of treatment;

(B) pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation; and

(C) reimburse the victim for income lost by such victim as a result of such offense;

(3) in the case of an offense resulting in bodily injury also results in the death of a victim, pay an amount equal to the cost of necessary funeral and related services; and

(4) in any case, if the victim (or if the victim is deceased, the victim's estate) consents, make restitution in services in lieu of money, or make restitution to a person or

organization designated by the victim or the estate.

(c) If the court decides to order restitution under this section, the court shall, if the victim is deceased, order that the restitution be made to the victim's estate.

(d) The court shall impose an order of restitution to the extent that such order is as fair as possible to the victim and the imposition of such order will not unduly complicate or prolong the sentencing process.

(e)(1) The court shall not impose restitution with respect to a loss for which the victim has received or is to receive compensation, except that the court may, in the interest of justice, order restitution to any person who has compensated the victim for such loss to the extent that such person paid the compensation. An order of restitution

shall require that all restitution to victims under such order be made before any restitution to any other person under such order is made.

(2) Any amount paid to a victim under an order of restitution shall be set off against any amount later recovered as compensatory damages by such victim in -

(A) any Federal civil proceeding; and

(B) any State civil proceeding, to the extent provided by the law of that State.

(f)(1) The court may require that such defendant make restitution under this section within a specified period or in specified installments.

(2) The end of such period or the last such installment shall not be later than -

(A) the end of the period of probation, if probation is ordered;

(B) five years after the end of the term of imprisonment imposed, if the court does not order probation; and

(C) five years after the date of sentencing in any other case.

(3) If not otherwise provided by the court under this subsection, restitution shall be made immediately.

(4) The order of restitution shall require the defendant to make restitution directly to the victim or other person eligible under this section, or to deliver the amount or property due as restitution to the Attorney General for transfer to such victim or person.

(g) If such defendant is placed on probation or paroled under this title, any restitution ordered under this section shall be a condition of such probation or parole. The court may revoke probation and the Parole Commission may revoke parole if the defendant fails to comply

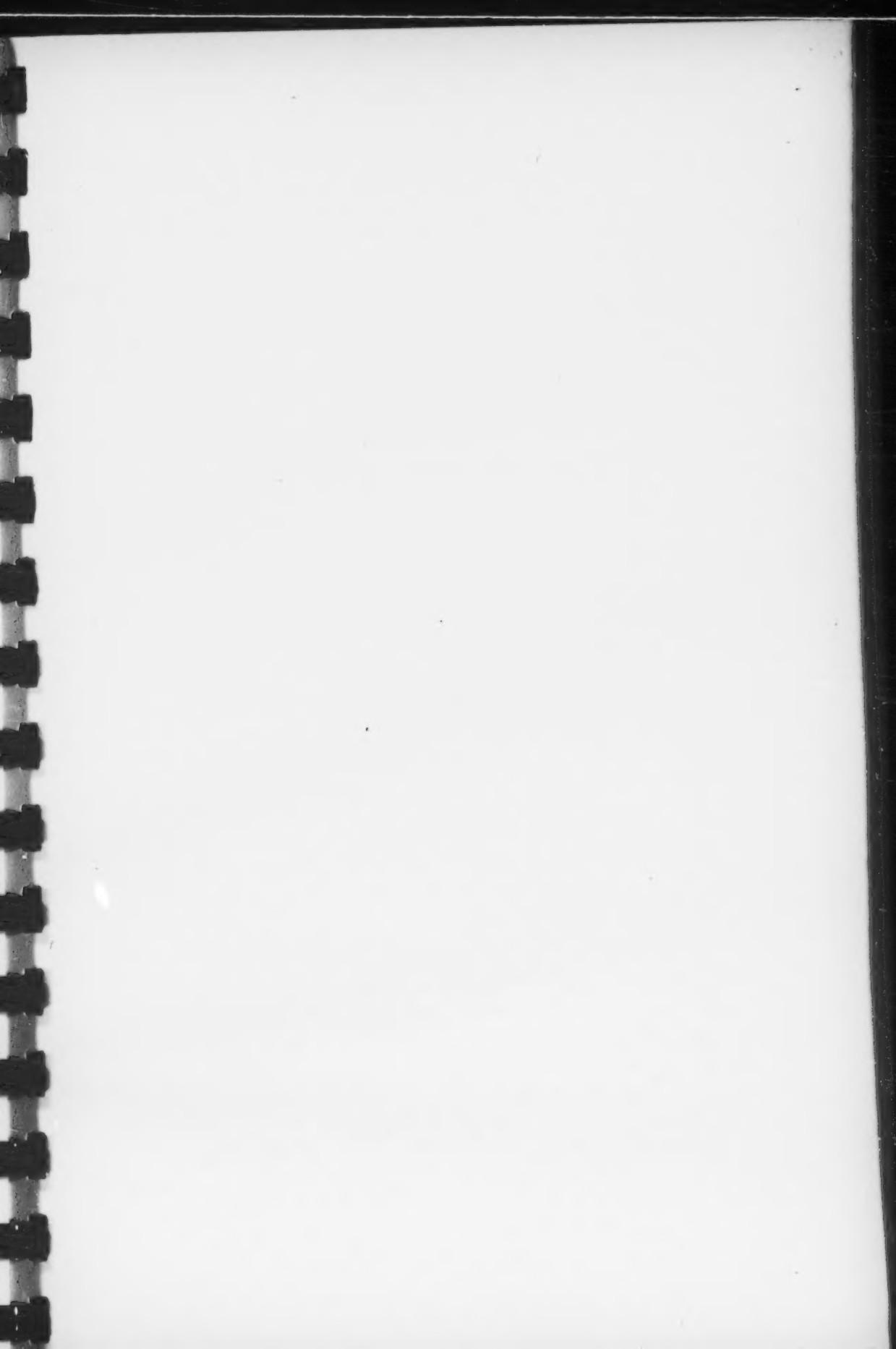
with such order. In determining whether to revoke probation or parole, the court or Parole Commission shall consider the defendant's employment status, earning ability, financial resources, the willfulness of the defendant's failure to pay, and any other special circumstances that may have a bearing on the defendant's ability to pay.

(h) An order of restitution may be enforced by United States or a victim named in the order to receive the restitution in the same manner as a judgment in a civil action. /

CONSTITUTION OF THE UNITED STATES

AMENDMENT V

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.



(Z)  
No. 88-121

Supreme Court, U.S.

FILED

SEP 19 1988

JOSEPH F. SPANIOL, JR.

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

---

LARRY D. BARNETTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

---

ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

CHARLES FRIED  
*Solicitor General*

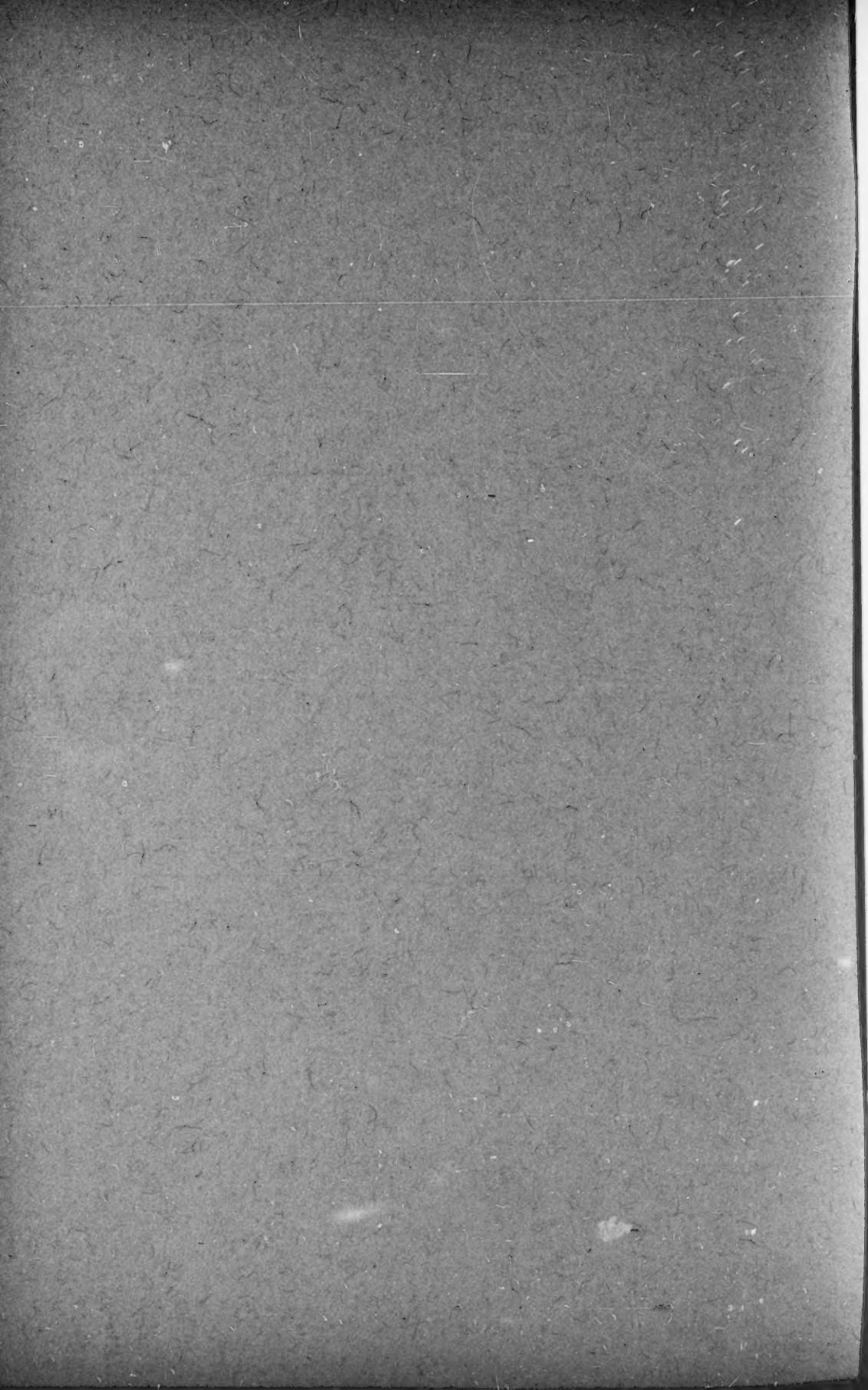
EDWARD S.G. DENNIS, JR.  
*Acting Assistant Attorney General*

DEBORAH WATSON  
*Attorney*

*Department of Justice  
Washington, D.C. 20530  
(202) 633-2217*

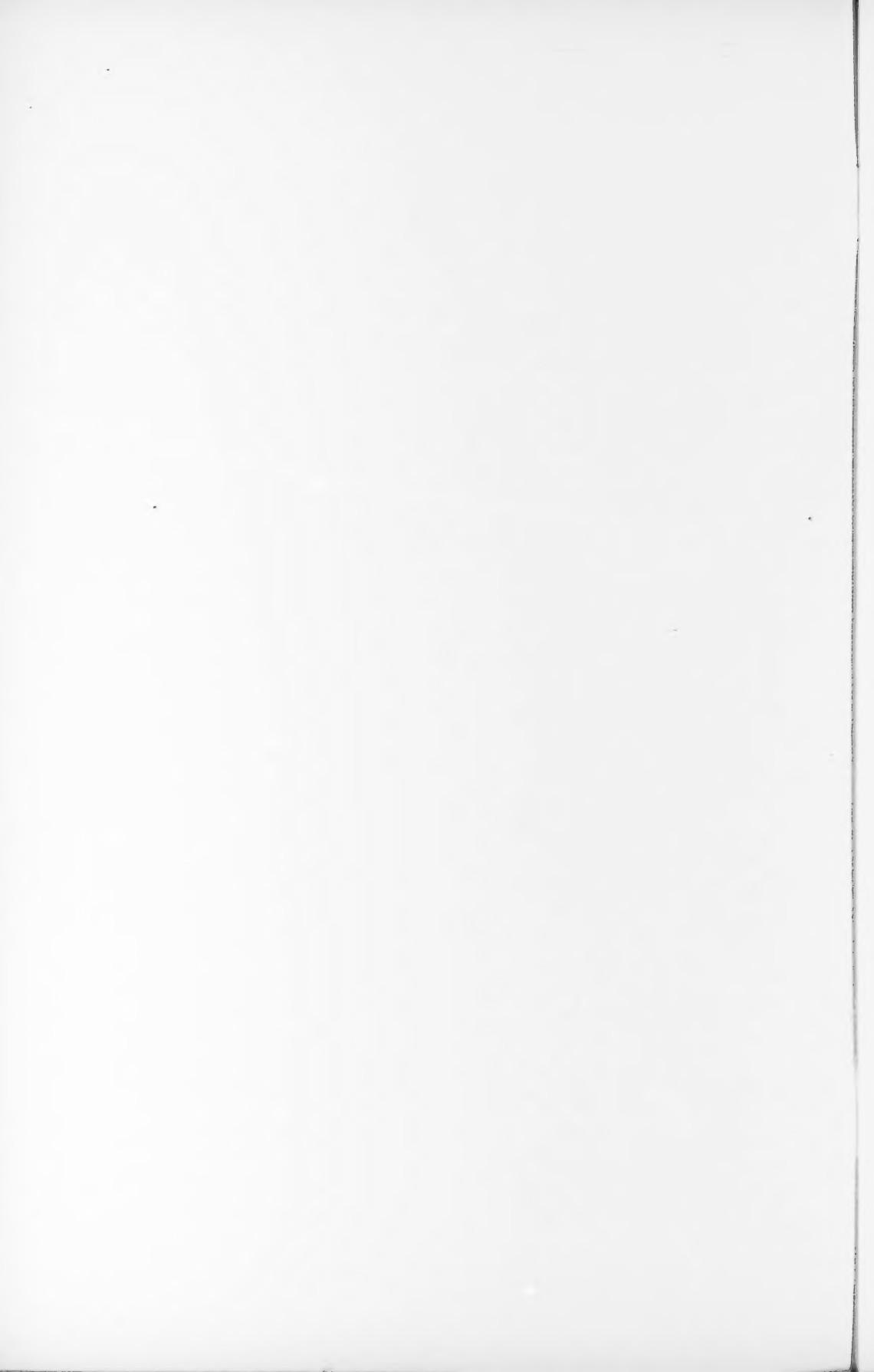
---

---



## **QUESTION PRESENTED**

Whether, where petitioners complied with the district court's requirement that they deposit with the court, pending appeal, the full amount of court-ordered restitution and fines awarded to the United States, it was proper to award to the United States interest on the money deposited commencing with the date originally set by the district court for payment of the restitution and fines.



## TABLE OF CONTENTS

	Page
Opinions below .....	1
Jurisdiction .....	1
Statement .....	2
Argument .....	4
Conclusion .....	9
Appendix A .....	1a
Appendix B .....	5a
Appendix C .....	7a

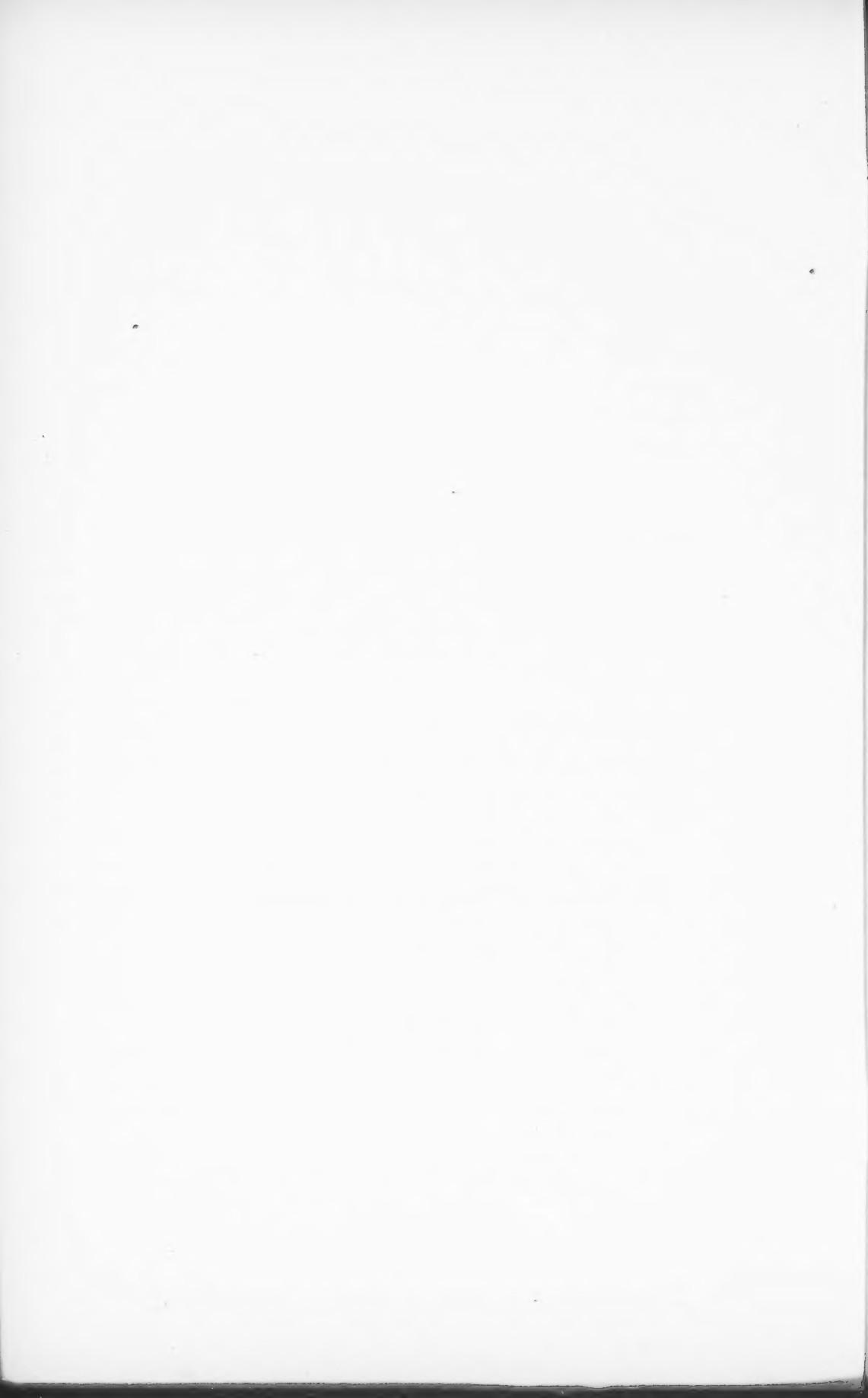
## TABLE OF AUTHORITIES

### Cases:

<i>Barnes v. United States</i> , 223 F.2d 891 (5th Cir. 1955) .....	7, 8
<i>North Carolina v. Pearce</i> , 395 U.S. 711 (1969) .....	7
<i>Solem v. Helm</i> , 463 U.S. 277 (1983) .....	5
<i>United States v. Jacob Schmidt Brewing Co.</i> , 254 F. 714 (D.N.D. 1918) .....	8, 9

### Constitution, statutes and rule:

U.S. Const. Amend. V (Double Jeopardy Clause) .....	5
Victim and Witness Protection Act of 1982:	
18 U.S.C. 3579 .....	6
18 U.S.C. 3579(a)(1) .....	5
18 U.S.C. 3579(f) .....	5
18 U.S.C. 3579(f)(1) .....	5
18 U.S.C. 3579(f)(3) .....	5
18 U.S.C. (Supp. IV) 3663 .....	6
18 U.S.C. (Supp. IV) 3663(a) .....	5
18 U.S.C. (Supp. IV) 3663(f) .....	5, 9
18 U.S.C. (Supp. IV) 3663(f)(1) .....	5
18 U.S.C. (Supp. IV) 3663(f)(3) .....	5
Fed. R. Crim. P.:	
Rule 38(c) .....	6, 9
Rule 38(e) .....	6, 9



In the Supreme Court of the United States  
OCTOBER TERM, 1988

---

No. 88-121

LARRY D. BARNETTE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS FOR  
THE ELEVENTH CIRCUIT*

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---

OPINIONS BELOW

The district court orders of December 13, 1984 (App., *infra*, 1a-4a, 5a-6a), granting petitioners' stays pending appeal and ordering the posting by each petitioner of the amounts of court-ordered restitution and fines, and of March 11, 1987 (App., *infra*, 7a-9a), disbursing to the United States the amounts of restitution and fines deposited with the court, and the interest thereon, and the opinion of the court of appeals (Pet. App. 1a-9a), are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 5, 1988. A petition for rehearing was denied on May 31, 1988 (Pet. App. 10a-11a). The petition for a writ of certiorari was filed on July 20, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

(1)

## STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioners were convicted of a variety of offenses arising from their fraudulent government contracting practices (Pet. App. 2a). Petitioner Barnette was sentenced to a total of five years' imprisonment and ordered to pay \$7 million in restitution to the government (Pet. App. 3a). Petitioner Allied Management Corporation was fined \$71,000, and petitioner Jets Venture Capital Corporation was fined \$2,000 (*ibid.*).

1. The judgment and commitment order as to petitioner Barnette specified that the restitution was to be paid within the first year of Barnette's confinement, and Barnette's surrender date was set for January 10, 1985 (Pet. App. 3a). The judgment and commitment orders as to petitioners Allied Management Corporation and Jets Venture Capital Corporation specified that the corporate fines were to be paid within 90 days of the date of judgment (*ibid.*). Petitioners thereafter filed motions to stay the judgment pending appeal, which were granted by the district court on December 13, 1984 (App., *infra*, 1a-4a, 5a-6a). The motion as to petitioner Barnette was granted upon the condition that Barnette "post[] by January 10, 1985, either the ordered restitution in the amount of \$7 million with the Clerk of the Court, to be placed in an interest bearing account during the pendency of the appeal, or a bond in an equivalent amount \* \* \*" (App., *infra*, 4a). The stay order further provided that any interest accruing on the deposited funds was to remain in the registry of the court (*ibid.*). As to petitioners Allied Management Corporation and Jets Venture Capital Corporation, the court granted the stay upon the condition that petitioners "post with the Clerk of the Court a certificate of deposit as

collateral for the payment of the fines" (App., *infra*, 5a-6a). Again, the order specifically provided that any interest accruing on the funds should remain in the registry of the court (*id.* at 6a). On January 10, 1985, petitioners posted the full amount of the restitution and fines with the clerk of the court in the form of one-year certificates of deposit (Pet. App. 3a-4a).

Petitioners' appeal was still pending when the certificates of deposit matured in January 1986, and petitioners moved for renewal of the certificates and return of accrued interest (Pet. App. 4a). The district court ordered the clerk to renew the certificates of deposit, but deferred ruling on petitioners' request for the interest pending resolution of the appeal (*ibid.*).

On October 8, 1986, the court of appeals affirmed petitioners' convictions and sentences (with the exception of one sentence on one count) (Pet. App. 4a). See *United States v. Barnette*, 800 F.2d 1558 (11th Cir. 1986), cert. denied, 480 U.S. 935 (1987). Petitioner Barnette commenced serving his term of imprisonment on December 4, 1986 (Pet. App. 4a). The government moved for disbursement of the funds in the court registry (*ibid.*). On March 11, 1987, the district court ordered that the funds and all accrued interest be disbursed to the government (App., *infra*, 7a-9a). In its order the court stated: "When staying the Judgments to allow [petitioners] to appeal, it was the intention of the Court to require [petitioners] to pay the restitution and fines imposed. While these sums were retained in the Registry of the Court pending appeal, it was not the Court's intention to return interest accumulated on these funds if the Judgments were affirmed" (*id.* at 8a). The court subsequently stayed its disbursement order pending appeal (Pet. App. 5a).

2. The court of appeals vacated the order of the district court and remanded for further proceedings (Pet.

App. 1a-9a). The court held that petitioner Barnette was entitled to the interest that had accrued on the funds prior to January 10, 1986 (Pet. App. 7a). The court reasoned that if Barnette had not pursued an appeal, his restitution payment would have come due on that date, one year after he would have commenced his term of imprisonment had there been no appeal and stay. Awarding the interest earned on the \$7 million during that year would thus have constituted "an impermissible burden on Barnette's right to appeal" (*ibid.*). The court held, however, that the government was entitled to any interest earned on the funds after January 10, 1986 (Pet. App. 7a-8a). The court explained that awarding the government interest accruing after that date "simply gives the Government what it would have had were there no appeal and had the money been paid when due," and that it "furthers the trial court's expressed intention that the appeal should not delay payment of the ordered restitution" (*id.* at 8a).

As to the corporate petitioners, Allied Management Corporation and Jets Venture Capital Corporation, the court found that their fines were to be paid within 90 days of the date of judgment, or by February 2, 1985 (Pet. App. 8a-9a). Accordingly, they were entitled to interest accruing on their bonds between January 10, 1985 and February 2, 1985; the balance of the accrued interest was to be paid to the government (*id.* at 9a).

#### **ARGUMENT**

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, certiorari should be denied.

Petitioners make a two-part challenge to the order of the district court, as modified by the appeals court, awarding the government interest that accrued on the funds after the original due dates of the fines and restitution.

First, they argue (Pet. 8-12) that the district court had no authority to award interest on the sum of money deposited in the district court registry pending appeal to secure the payment of court-ordered restitution and fines. Second, they argue (Pet. 12-16) that the order awarding interest to the United States violated the Double Jeopardy Clause because it increased their sentences following an affirmance on appeal of their convictions. Neither of these claims has merit.

1. The Victim and Witness Protection Act of 1982 authorizes a sentencing court to impose an order of restitution "in addition to or \* \* \* in lieu of any other penalty authorized by law" (18 U.S.C. (Supp. IV) 3663(a) [previously, 18 U.S.C. 3579(a)(1)]).<sup>1</sup> The Act gives the sentencing court broad discretion to determine the timing of payment of restitution (18 U.S.C. (Supp. IV) 3663(f) [18 U.S.C. 3579(f)]). The Act provides that the court may require that restitution be made "within a specified period or in specified installments" (§ 3663(f)(1) [§ 3579(f)(1)]) or, if not otherwise provided by the court, that restitution shall be made immediately (§ 3663(f)(3) [§ 3579(f)(3)]). The broad authority granted the court under the Act is consistent with the well accepted principle that a trial court has wide discretion in setting criminal sentences. See *Solem v. Helm*, 463 U.S. 277, 290 (1983).

The district court is given similarly broad discretion in determining whether, and under what conditions, to grant

---

<sup>1</sup> This provision has recently been renumbered. The certiorari petition cites the previous United States Code designations of the sections of this provision, which are hereinafter provided in brackets following the current Code citations.

a stay of execution of sentence pending appeal. Thus, Fed. R. Crim. P. 38(e) provides:

A sanction imposed as part of the sentence pursuant to [18 U.S.C. (Supp. IV) 3663 [3579]] may, if an appeal of the conviction or sentence is taken, be stayed by the district court or by the court of appeals upon such terms as the court finds appropriate. The court may issue such orders as may be reasonably necessary to ensure compliance with the sanction upon disposition of the appeal, including the entering of a restraining order or an injunction or requiring a deposit in whole or in part of the monetary amount involved into the registry of the district court or execution of a performance bond.

Similarly, Fed. R. Crim. P. 38(c) grants a district court discretion to stay a sentence to pay a fine, pending appeal, "upon such terms as the court deems proper." Here, the district court's orders granting petitioners' motions for stay of execution pending appeal were conditioned on the requirement that any interest accruing on the deposited funds was to remain in the registry of the Court (App., *infra*, 4a, 6a). Indeed, in ordering the disbursement of the interest that had accrued on the \$7 million posted by petitioner Barnette, the district court unequivocally stated that, at the time it stayed the judgments to allow petitioners to appeal, it was the intention of the court to require petitioners to pay the court-ordered amounts and, if the judgments were affirmed, not to return the interest accumulated on these funds (App., *infra*, 8a). The court of appeals modified the condition that interest be retained by returning a portion to petitioners so as not to burden petitioners' right to take an appeal. The district court's authority to determine the conditions of stay, as so modified, was fairly encompassed by Rule 38(e), which authorizes a district court to condition a stay pending appeal "upon such terms as the court finds appropriate."

2. As the court of appeals recognized (Pet. App. 6a), a trial court cannot penalize a defendant for pursuing an appeal from his conviction. *North Carolina v. Pearce*, 395 U.S. 711, 723-724 (1969). Contrary to petitioners' assertion (Pet. 13-16), the result reached by the court of appeals did not penalize petitioners for pursuing an appeal by increasing their sentences because petitioners incurred no increase in their sentences following affirmance of their convictions. Under the terms of his sentence, petitioner Barnette's restitution payment would have been due January 10, 1986—one year after he would have commenced his term of imprisonment had there been no appeal and stay. Similarly, under the terms of their sentences, petitioners Allied Management Corporation and Jets Venture Capital Corporation were to pay their fines by February 2, 1985. Accordingly, the award to the government of interest accruing after those dates "simply [gave] the Government what it would have had were there no appeal and had the money been paid when due" (Pet. App. 8a), and thus did not constitute an improper increase of sentence.<sup>2</sup>

---

<sup>2</sup> The Fifth Circuit's decision in *Barnes v. United States*, 223 F.2d 891 (1955), cited by petitioners (Pet. 13), fails to support petitioners' argument that the district court penalized petitioners' decision to appeal. In *Barnes*, the district court order required as a condition of stay pending appeal that the defendant pay court costs if the conviction were affirmed. The appeals court vacated the order on review because the district court lacked power to condition a stay bond "upon an increase of the sentence in the event of an affirmance" (223 F.2d at 893).

Unlike in *Barnes*, the condition the district court below imposed on the stay pending appeal did not increase petitioners' sentences. The sum in the amount of court costs would have been retained by the defendant in *Barnes* had he not appealed. In contrast, if petitioners in the instant case had not appealed, they would *not* have been entitled to the interest accruing after the due date of their fines and restitution; the government would have retained that money. Thus, unlike the

3. Petitioners contend (Pet. 11) that the decision of the court of appeals conflicts with *United States v. Jacob Schmidt Brewing Co.*, 254 F. 714 (D.N.D. 1918). There, the defendant was convicted of a liquor offense and sentenced to a \$7,250 fine. The defendant took an appeal from the judgment and posted a stay bond. His conviction was ultimately affirmed. The issue before the court of appeals was whether the government was entitled to interest upon the judgment from the date it was entered to the time of its payment following affirmation of defendant's conviction. Because there was no statute providing for interest on judgments in criminal cases as there was for interest on judgments in civil cases, the court held that the government was not entitled to interest upon the judgment.

The holding in *Jacob Schmidt Brewing* plainly does not govern the instant case. In that 1918 decision, no time for the payment of the fine was set forth by the district court. Here, the original terms of the district court's sentences set a definite time for payment of restitution and fines. In ordering the posting of the full amount of the restitution and fines, the district court intended that such posting would itself constitute the actual transfer of those funds with nothing to be returned to petitioners unless the district court judgment was reversed (App., *infra*, 8a). Although the court of appeals correctly vacated that aspect of the district court's order that penalized petitioners for their decision to take an appeal, its decision to give sway to the district court's intention that the restitution and fines be treated as a completed transfer (with subsequent interest going to the United States as early as

---

defendant in *Barnes*, petitioners incurred no additional liability by choosing to exercise their right to appeal because their penalty after affirmance on appeal was no greater than that imposed in the first instance.

legally permissible) was proper and consistent with *Jacob Schmidt Brewing*. Since there is no reason to doubt that the district court had discretion to deny a stay of execution with regard to the order of restitution (18 U.S.C. (Supp. IV) 3663(f) [18 U.S.C. 3579(f)]; Fed. R. Crim. P. 38(e)), and the fines (Fed. R. Crim. P. 38(c)), the court certainly had the power to require their payment on the schedule that would have governed had no appeal been taken.

#### CONCLUSION

The petition for a writ of certiorari should be denied.  
Respectfully submitted.

CHARLES FRIED  
*Solicitor General*

EDWARD S.G. DENNIS, JR.  
*Acting Assistant Attorney General*

DEBORAH WATSON  
*Attorney*

SEPTEMBER 1988

$\frac{P_0}{\gamma}$

## **APPENDIX A**

### **UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION**

---

**Case No. 83-131-Cr-J-14**

**UNITED STATES OF AMERICA, PLAINTIFF**

**vs.**

**LARRY D. BARNETTE, ET AL. DEFENDANT**

---

**[Filed Dec. 13, 1984]**

---

### **ORDER GRANTING MOTION TO STAY**

This case came on to be heard on the defendant Larry D. Barnette's Motion to Stay Sentence and to Grant Post-Conviction Release, filed herein on November 13, 1984. On that same date the defendant filed his Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. The government filed its memorandum in opposition on November 16, 1984. At the hearing held on this motion on December 4, 1984, the Court requested that the parties file supplemental memoranda addressing the effect of provision 18 U.S.C. § 3143(b) of the Comprehensive Crime Control Act [hereinafter "section 3143(b)"] on defendant's motion. The government filed its supplemental memorandum on December 7, 1984, and the defendant filed his on December 12, 1984. A second hearing w[a]s held on the defendant's motion on December 13, 1984.

On October 12, 1984, the President signed into law the Comprehensive Crime Control Act of 1984. Public Law 98-473. The government's position is that in order to be

**(1a)**

granted post-conviction release under section 3143(b) of the Act the defendant bears the burden of demonstrating that:

1. He is not likely to flee,
2. He does not pose a danger to the safety of any other person or to the community,
3. He is not appealing for the purpose of delay, and that
4. He is raising by his appeal substantial questions of law or fact likely to result on reversal of his conviction or an order for new trial.

As to the second and third factors, having presided through the extensive pretrial and trial proceedings in this case, and having reviewed the memoranda regarding this motion as well as other pleadings relevant to this matter, the Court finds that the defendant does not pose a danger to the safety of others or to the community, and that his appeal is not taken for the purpose of delay. Therefore, the second and third requirements of section 3143(b) have been met.

As to the fourth factor, the Court will review the parties' positions and discuss the issues raised by the recent passage of section 3143(b). The government states that Congress sought, in enacting section 3143, to recognize the presumed correctness of convictions, to address community safety needs in considering post-conviction bail, and to eliminate dilatory appeals. *See S. Rep. No. 225, 98th Cong., 2d Sess. (1984).* In this respect, requiring a defendant to demonstrate the fourth factor is pivotal to effecting Congress' goals. The defendant responds that it would be "ridiculous" to believe that Congress enacted a law requiring the trial judge who heard the case and who ruled on the motions presented in the case to state that the court was probably in error and that an appellate court would likely reverse. The defendant submits that the new language

should be construed in substantially the same manner as the former language requiring that the appeal not be "frivolous". The Court agrees with the defendant that were the Court to make the finding that reversal in this case is likely, as required by section 3143(b), the Court would have granted the defendant's previously filed motion for new trial. The Court does not agree with the defendant's suggestion that the former "frivolous" standard should be relied on in interpreting the fourth requirement of section 3143(b). If Congress had so intended, it would not have specifically changed that language. Faced with determining the proper application of section 3143(b), the Court is once again compelled in this case to deal with an issue of first impression.

The Court finds upon its review of the file that the defendant's appeal does not raise a substantial question of law or fact likely to result in reversal or an order for new trial. However, the Court recognizes that this case involved many novel questions of law for which no precedent has been established. While the Court at all times made rulings it felt to be legally correct, in many instances the legal issue involved was one of first impression. Such issues are appropriate for appellate review. The Court finds that appellate review of this case would have precedential benefit and that the existence of issues of first impression is sufficient to meet the fourth requirement of section 3143(b).

As to the first factor, likelihood of flight, the government concludes that the defendant is likely to flee because he is a convicted felon who has received concurrent five (5) year incarceration sentences on 14 separate criminal violations. As a result of his convictions he is further obligated to repay the government in excess of \$7 million in restitution and fines. The government further contends that a substantial portion of his assets are located outside the

United States and that most of his remaining assets consist of stock in several American corporations that could be controlled from a location outside the United States. In addition to the factors cited by the government, the Court is aware that the defendant's wife and child are currently residing in Europe. See page 14 of the Presentence Investigation Report on Larry D. Barnette. The Court finds, however, that the defendant's appearance can be assured by a condition of release requiring that the defendant post either the ordered restitution with the Clerk of the Court, to be placed in an interest bearing account during the pendency of the appeal, or a bond in an equivalent amount.<sup>1</sup>

Upon consideration, it is

**ORDERED AND ADJUDGED:**

1. That the defendant Larry D. Barnette's Motion to Stay and to Grant Post-Conviction Release, filed herein on November 13, 1984, is granted.
2. That the defendant is permitted to remain at liberty pending appeal from the Judgment of Conviction on the bond previously posted. To insure his appearance at all future proceedings his release is further conditioned on the defendant posting by January 10, 1985, either the ordered restitution in the amount of \$7 million with the Clerk of the Court, to be placed in an interest bearing account during the pendency of the appeal, or a bond in an equivalent amount; any interest accruing thereon to remain in the registry of the Court.

ORDERED at Jacksonville, Florida, this 13 day of December, 1984.

/s/ SUSAN H. BLACK  
United States District Judge

---

<sup>1</sup> The Court's finding is based not only on its review of the entire file but also the *in camera* documents file with the Court and attached to its order dated October 15, 1984.

**APPENDIX B**

**UNITED STATES DISTRICT COURT  
MIDDLE DISTRICT OF FLORIDA  
JACKSONVILLE DIVISION**

---

**Case No. 83-131-Cr-J-14**

**UNITED STATES OF AMERICA, PLAINTIFF  
vs.**

**LARRY D. BARNETTE, ET AL. DEFENDANT**

---

**[Filed Dec. 13, 1984]**

---

**ORDER**

This case is before the Court on the Defendants Allied Management Corporation and Jets Venture Capital Corporation's Motion for a Stay of the Payment of Fines Pending Appeal, filed herein on November 13, 1984. The government's memorandum in opposition was filed on November 16, 1984.

The defendants filed their notice of appeals from this Court's adjudication and sentence to the United States Court of Appeal for the Eleventh Circuit on November 13, 1984. The defendant Allied Management Corporation seeks a stay of its payment of fines totalling \$71,000.00 which are to be paid within 90 days from the date of the Judgment entered on November 2, 1984. A stay is also sought by the defendant Jets Venture Capital Corporation which is required to pay fines totalling \$2,000.00 within 90 days from the date of the Judgment entered on November 2, 1984. The defendants state their willingness to post with

the Clerk of the Court a certificate of deposit as collateral for the payment of the fines should the Court grant the requested stays. The government is in basic agreement with the defendants' suggestion but would have the interest accruing during the pendency of the appeal remain in the Court registry. The Court agrees that the interest should remain in the registry until its disposition is finally determined.

Upon consideration, it is

ORDERED:

1. That defendants Allied Management Corporation and Jets Venture Capital Corporation's Motion For a Stay of the Payment of Fines Pending Appeal, filed herein on November 13, 1984, is granted.
2. That the defendants have 30 days in which to post with the Clerk of the Court a certificate of deposit issued by a banking institution which is insured under provisions of federal law in an amount totalling \$73,000.00, the interest accruing thereon to remain in the registry of the Court.

ORDERED at Jacksonville, Florida, this 13 day of December, 1984.

/s/ SUSAN H. BLACK

United States District Judge

## APPENDIX C

### UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE DIVISION

---

Case No. 83-131-Cr-J-14

UNITED STATES OF AMERICA,

vs.

LARRY D. BARNETTE, ET AL.

---

[Filed Mar. 11, 1987]

---

## ORDER

This case is before the Court on the Motion For Order Requiring (1) The Clerk Of This Court To Disburse To The United States Army The \$7,000,000 Restitution Posted With The Clerk And All Interest That Has Accrued Thereon And (2) The Corporate Defendants To Pay Their Fines Forthwith, filed herein on January 29, 1987. Defendants LARRY D. BARNETTE, ALLIED MANAGEMENT CORP. and JETS VENTURE CAPITAL CORP. filed their response in opposition on February 9, 1987. Defendant BARNETTE's Addendum to his response was filed February 12, 1987. The government filed a response on February 13, 1987. In addition, a Motion To Stay Payment Of Interest On Allied Management Corporation Fine Of \$71,000.00 And Jets Venture Capital Corporation Of \$2,000.00 was filed on February 27, 1987.

The Court has reviewed the motions and memoranda filed by the parties. The Court finds that the government's

response, filed February 13, 1987, accurately reflects the procedural history and intention of the Court regarding defendant BARNETTE's deposit of \$7,000,000.00 into the Registry of the Court. The government's response also characterizes accurately the Court's intention with regard to ALLIED MANAGEMENT CORP.'s and JETS VENTURE CAPITAL CORP.'s deposits into the Registry of the Court. When staying the Judgments to allow the defendants to appeal, it was the intention of the Court to require the defendants to pay the restitution and fines imposed. While these sums were retained in the Registry of the Court pending appeal, it was not the Court's intention to return interest accumulated on these funds if the Judgments were affirmed. Therefore, the Court will direct the Clerk of the Court to pay the amounts currently held in the Registry of the Court along with all interest to the appropriate parties. In light of this determination, the Court will deny the motion to stay.

Accordingly, it is

ORDERED:

1. That the Motion For Order Requiring (1) The Clerk Of This Court To Disburse To The United States Army The \$7,000,000 Restitution Posted With The Clerk And All Interest That Has Accrued Thereon And (2) The Corporate Defendants To Pay Their Fines Forthwith, filed herein on January 29, 1987, is granted.
2. That the Clerk of the Court is hereby directed to issue to the United States Attorney's Office in Jacksonville, a check made payable to the United States Army for the amount presently deposited in the Registry of the Court from defendant LARRY D. BARNETTE's restitution in the amount of \$7,000,000.00, plus all interest accumulated.

3. That the Clerk of the Court is hereby directed to pay to the United States the amounts deposited into the Registry of the Court by defendants ALLIED MANAGEMENT CORP. and JETS VENTURE CAPITAL CORP. for the fines imposed in the amounts of \$71,000.00 and \$2,000.00, respectively, plus all interest accumulated.

4. That the Motion To Stay Payment of Interest On Allied Management Corporation Fine Of \$71,000.00 And Jets Venture Capital Corporation Of \$2,000.00, filed herein on February 27, 1987, is denied.

DONE AND ORDERED at Jacksonville, Florida, this 11 day of March, 1987.

/s/ SUSAN H. BLACK

United States District Judge